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How to Describe the Law of the Welfare State?

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How to Describe the Law of the Welfare State?

About 200 years ago, legal concepts based on the idea of *formal* equality prevailed. Over the last 150 years, however, the law has tried on a large scale to establish *substantive* equality, or at least to alleviate social and economic imbalances. To this day, the law which has undertaken this task has grown in scope and become increasingly differentiated. It has become one of the most important components of modern legal systems and has a history with its own distinctive contours. The terms used to summarise the corresponding legal materials are manifold: law of the welfare state, law of the provident state (*état providence*) (François Ewald), social law, social welfare law, etc.

If one asks how this law was taken into account in the two *Oxford Handbooks*, one first comes across the contribution by Bruno Aguilera-Barchet in the *Oxford Handbook of European Legal History* (»The Law of the Welfare State«). In addition, Michael Stolleis discusses social law under National Socialism (»European Twentieth-Century Dictatorship and the Law«) in the same volume, and the *Oxford Handbook of Legal History* discusses the influence of welfare ideas on the development of contract law (Anat Rosenberg, »What Do Contracts Histories Tell Us About Capitalism?: From Origins and Distribution, to the Body and the Nation«). Outside this contribution, we find only a few scattered mentions of the topic. Thus it is noticeable that this legal matter – despite its significance – has received relatively little attention in the latter handbook. It is likely that this is the result of its editors' express intention to present research approaches rather than subject areas.

If the law of the welfare state is to be investigated historically, it must be borne in mind that the object of this analysis is difficult to delineate. It will certainly be possible to agree that the law of social assistance and the law of social insurance belong to it. But even the question of whether labour law is part of it has to be answered differently depending on the legal system. In addition, social law elements can be found in many other areas of law. And finally, it should be noted that there is a lack of a coherent, traditional line of welfare state thinking, of any integrating great ideas at all, which makes a description of the pertinent history of ideas difficult. The welfare state has no Hobbes, no Adam Smith, no Rousseau and no Kant.[1] Describing the history of this law thus poses an enormous challenge.

In the following, I will discuss how Aguilera-Barchet met this challenge in his contribution. His chapter consists of two major sections, »An Essay on the Constitutional History of the Welfare State« and »The ›Role‹ of Law in the Welfare State«. Whether the first section can be called constitutional history is questionable. Basically, it is an extraordinarily stimulating brief history of social policy over the last two centuries, with a kind of prehistory stretching into the Middle Ages and the early modern period. Here Aguilera-Barchet describes the social policy debates and the social policy reforms that took place in various European countries, and traces how the welfare state developed as a certain type of organisation of the community. The text impressively unfolds various European perspectives. However, there is a lack of a clear legal-historical, above all constitutional-historical layout.

Only the second section opens up a genuinely legal-historical perspective. It deals with four thematic areas: 1. social citizenship (as the »second generation of fundamental rights«), 2. legal sources of the welfare state (here Aguilera-Barchet almost exclusively discusses labour law), 3. conflict resolution mechanisms of the welfare state (again focusing exclusively on labour law conflicts), 4. scholarly social law. As the details of the history of labour law are the subject of Gerd Bender's article in this *Forum* section, I will limit myself here to discussing only the prominent emphasis on labour law made by the author. This issue touches on the question of what the characteristic law of the

1 Jürgen Kaube, Das Reflexionsdefizit des Wohlfahrtsstaates, in: Stephan Lessenich (Hg.), Wohlfahrtsstaatliche Grundbegriffe. Historische und aktuelle Diskurse, Frankfurt / New York 2003, 41–54.

welfare state is. That in turn leads to the question how the author defines a »welfare state«. This is a central problem of Aguilera-Barchet's discussion.

For Aguilera-Barchet, the benchmark of the Western welfare state is the British model with tax-funded universal services as it was developed in the aftermath of the Second World War. By contrast, according to the author, Bismarck's model does not correspond to the system logic of the welfare state because it merely forced citizens to take out insurance. Put so categorically, this view seems problematic. The literature on the welfare state to date clearly assumes the historical existence of various different welfare state models, albeit some of them converging or appearing in mixed combinations. In view of this, it would have been appropriate to deal more extensively with this current state of scholarly opinion.

However, another circumstance weighs more heavily. As already mentioned, in the second part of his contribution Aguilera-Barchet deals – apart from fundamental social rights – almost exclusively with regulatory complexes of labour law. However, these complexes cannot be regarded as the characteristic regulatory instrument of the welfare state according to the Beveridge model. If one orients oneself towards these structures, the rules for the National Health Service, for example, would have to be addressed. The labour law regimes that the author deals with, above all labour protection laws, the law of collective bargaining and labour law jurisdiction, had already begun to emerge in the 19th century and have nothing to do with the system of tax-financed universal social services. This divergence between the model chosen as paradigmatic in the article's first part and the presentation of the related legal matters in the second results in a certain incoherence of presentation.

Following on from these remarks, I would like to conclude by highlighting a number of aspects that seem important if the law of the welfare state is to be presented from a historical perspective.

First of all, a pluralistic understanding of »welfare state« is required: there are several types, and each has its own characteristic law. A further task is to examine interdependencies, mixtures and convergences between these types. However, it is also possible – regardless of the type – to identify certain common core problems, which I will only sketch briefly here.

First, every welfare state is first and foremost a provident state. It legislates in order to prevent risks (accident, illness, invalidity, unemployment), which are no longer considered an acceptable fate but seen as resulting in a need for action which becomes a public task. This also means a considerable break with previous ideas about the purpose of law. It no longer serves only the appropriate balancing of conflicting interests but is increasingly becoming the law of social risk prevention and risk aftercare.

Second, a legal history of the welfare state must not only concentrate on those areas of law that, because of their outstanding political significance, appear to be particularly attractive for historical consideration, i. e. above all regarding constitutional and labour law. The complex issues of social insurance law and social assistance law are essential for the functioning of the welfare state. In Aguilera-Barchet's presentation, these matters are underrepresented. They are addressed in the first part, but their legal dimension is not discussed in the second.

Third, the law of the welfare state must not only be understood as a law of social benefits, but also to a large extent as an organisational law, determining which organisation undertakes which tasks, equipped with which legal means. Private and semi-state actors thus also come to the fore. This directs attention from the welfare *state* to welfare *governance*.

Fourth, the law of the welfare state must be understood in a much stronger way as a special order that incorporates different rationalities in a particular way: those of the political system, the economic system, the educational system, the health system and the religious system. The latter can easily be made plausible if one considers the case of Germany, where the idea of subsidiarity (deriving from Catholic social thought) was for a long time one of the constitutive principles of the welfare state.

These thoughts certainly lead beyond what can feasibly be discussed within the limited pages of a handbook chapter. In this respect, the discussion of such handbook articles also serves as a starting point for reflections on the various perspectives from which a legal history of the welfare state can be written.

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